82-119

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In The

Supreme Court of the United States

October Term, 1982

No.

AMERICAN LAUNDRY PRESS CO.
and its successor corporation,
McGRAW-EDISON COMPANY,

Petitioners,

vs.

OK NYO REXRODE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BYRON L. GREGORY
Counsel for Petitioner

Of Counsel:

STEVEN H. HOEFT
ROGER W. WENTHE
McDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000

CHAS. P. YOUNG CHICAGO, INC.

QUESTIONS PRESENTED FOR REVIEW

The petitioners, American Laundry Press Co. and its successor corporation, McGraw-Edison Company, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 12, 1982, as modified on April 22, 1982 on the following issues:

1. Whether the Court of Appeals erred by determining the admissibility of evidence in this diversity action under state law, rather than under the Federal Rules of Evidence.

2. Whether evidence of the compliance of the petitioners' product with an industry standard was properly excluded by the Court of Appeals from this strict products liability action.

3. Whether the prejudicial impact on the jury of the respondent's counsel's repeated references to irrelevant personal injury claims against the petitioners was merely a harmless error as the Court of Appeals concluded.

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OPINIONS BELOW

The judgment of the District Court on the jury's verdict is reproduced in the Appendix at A-1. The original opinion of the Court of Appeals is reproduced in the Appendix at A-2; the modified opinion of the Court of Appeals is reported at 674 F.2d 826 and is reproduced in the Appendix at A-17.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 12, 1982. A timely petition for rehearing was denied on April 22, 1982. This petition is being timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATEMENT OF THE CASE

This is an action arising out of injuries suffered by the respondent while she was operating a laundry press which had been manufactured by the petitioner American Laundry Press Company. While this petitioner had sold the laundry press to the United States government in 1959 and it had been operated without incident from 1959 to 1977, the respondent nevertheless claimed that some unknown defect of the press caused the head of the press to close on her hand while she was operating it in 1977. She brought this action against the petitioners to recover for her injuries based on theories of negligence, strict products liability and breach of warranty.[1]

Through pretrial discovery, the respondent's counsel was informed of the identity of other individuals who had made claims that they were injured while operating other laundry or dry cleaning presses which the petitioners had manufactured. Since many of these claims involved presses which were substantially dissimilar to the subject laundry press, the petitioners sought through an *in limine* motion to bar the respondent's counsel from making any reference to these irrelevant claims before the jury. The district court granted that motion, in part, and limited the respondent's counsel to cross-examination of witnesses about claims against the petitioner of which they had personal knowledge relating to presses similar to that which respondent had operated. Nevertheless, throughout the trial, the respondent's counsel intentionally referred to these irrelevant claims during his cross-examination of the petitioners' witnesses with state-

[1] In addition to the parties listed in the caption to this petition, the United States participated in the district court as an intervenor to recover on the statutory subrogation rights arising from its payment of plaintiff's medical fees. The United States did not participate in the appeal. Petitioner American Laundry Press Co. no longer exists, and petitioner McGraw-Edison Co. has no domestic affiliates other than wholly-owned subsidiaries.

ments as graphic as "the press head was caused suddenly and without warning to close upon the left hand of the plaintiff, thereby causing severe and permanent injuries to his person, including and not limited to the partial amputation of his left hand." (A-33).

At trial the respondent offered no reasonable explanation about why the press head closed on her hand. Her claim rested principally on her contention that the laundry press was defective because its design did not conform to prevailing industry standards and government regulations. To support that contention, the respondent offered as evidence a standard for laundry presses which had been adopted in 1941 by the American National Standards Institute (ANSI) and an Occupational Safety and Health Act (OSHA) regulation regarding laundry presses, which had been proposed in 1972 but was never adopted, to which the subject press allegedly failed to conform. The district court admitted both the 1941 ANSI standard and the 1972 OSHA proposal into evidence.

However, the district court excluded from evidence the ANSI standard for laundry presses which had been adopted in 1972 to which the subject press conformed, even though this standard was the successor to the 1941 ANSI standard upon which the respondent relied. This excluded ANSI standard had been offered by the petitioners to demonstrate that the respondent's interpretation of the 1941 ANSI standard was incorrect and to show that the subject press complied with industry standards at the time of the occurrence.

On June 30, 1980, a verdict in the amount of $750,000 was returned in favor of the respondent and judgment was entered accordingly. The petitioners' alternative motions for a new trial and for judgment notwithstanding the verdict were denied. The petitioners appealed the entry of the judgment to the United States Court of Appeals for the Tenth Circuit.

On March 12, 1982, the Court of Appeals affirmed the judgment in favor of the respondent. With respect to the

exclusion from evidence of the 1972 ANSI standard, the Court of Appeals first held that state law, not the Federal Rules of Evidence, governed the admissibility of the standard. (A-11 n.17). The Court of Appeals next decided that no Kansas state court had considered whether evidence of conformance to industry standards was admissible in a strict products liability action, ignoring or overlooking the fact that the Kansas Supreme Court had held in *Jones* v. *Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976), that conformance to industry standards was prima facie evidence that a product was not defective. (A-12). The Court of Appeals alternatively concluded that the 1972 ANSI standard had been properly excluded on the issue of feasibility of alternate designs because it was irrelevant and possibly confusing. (A-14).

With respect to the effect of the respondent's counsel's repeated reference to irrelevant personal injury claims against the petitioners, the Court of Appeals held that these were harmless errors which were cured by the trial court's instruction to the jury that the remarks of counsel are not evidence.

The petitioners petitioned for a rehearing because, among other reasons, the Court of Appeals mischaracterized the Kansas Supreme Court's decision in *Jones* v. *Hittle*, *supra*, as involving simply a negligence case, not a strict product liability case. The Court of Appeals denied the petition but modified its opinion with a cosmetic change in its characterization of *Jones* v. *Hittle*. (A-27).

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE FEDERAL RULES OF EVIDENCE OR STATE LAW CONTROLS THE ADMISSIBILITY OF EVIDENCE IN A DIVERSITY ACTION.

The Court of Appeals concluded that the 1972 ANSI standard was properly excluded from evidence under Kansas law. The Court of Appeals' misinterpretation of Kansas law is discussed below. However, regardless of the admissibility of industry standards under the law of Kansas, the 1972 ANSI standard should have been admitted into evidence under the governing Federal Rules of Evidence. The Court of Appeals' unwillingness to apply the Federal Rules to this evidentiary issue is contrary to the supremacy clause, U.S. Const. art. VI. The holding that the admissibility of such evidence is controlled by state law also conflicts with decisions of the United States Court of Appeals for the Third, Fourth, Fifth and Eighth Circuits holding that the Federal Rules of Evidence, not the law of the state in which the federal court sits, control the admissibility of relevant evidence in a diversity action.

The Federal Rules of Evidence were adopted by Congressional statute, Pub.L. No. 93-959, 88 Stat. 1926, rather than being issued under the Rules Enabling Act of 1934, 28 U.S.C. § 2072 (1976), the authority under which this Court promulgated the Federal Rules of Civil Procedure. 10 Moore's Federal Practice § 35. The authority for the Rules of Evidence is Article III of the United States Constitution, which empowers Congress to "ordain and establish" the lower federal courts and procedures governing them. 10 Moore's Federal Practice § 57. The applicability and scope of the Federal Rules of Evidence in a diversity action are governed by wholly different considerations than those that apply to rules issued under the Rules Enabling Act. The reasonable exercise of Congress' power by the adoption of the Rules of Evidence supersedes any inconsistent rule of evidence under state law, without regard to whether it is

"substantive" or "procedural." The boundaries of this power, which have not yet been addressed by this Court, must encompass at the least the area of admissibility in the federal courts of evidence that is undisputedly relevant. Therefore, the Court of Appeals in this case committed reversible error when it applied the rule it presumed the Kansas courts would follow rather than following the mandate of Section 402 of the Federal Rules of Evidence that all relevant evidence not excluded by other statutes or rules is admissible.

An industry standard which was in effect at the time of the occurrence and which was the successor to the industry standard in effect at the time the product was manufactured is certainly relevant under Rule 401 of the Federal Rules of Evidence to the respondent's claim that the product was defective and unreasonably dangerous. *See Murphy* v. *L&J Press Corp.*, 558 F.2d 407 (8th Cir. 1977). Since compliance with the standard was relevant and not otherwise excluded by a special statute or rule, the standard and evidence of compliance with it were also admissible under Rule 402 of the Federal Rules of Evidence. Thus, if the Federal Rules of Evidence govern the admissibility of evidence in a diversity action, then the 1972 ANSI standard was improperly excluded by the courts below.

The improper exclusion of the 1972 ANSI standard had two significant adverse effects on the petitioners. *First*, the petitioners were denied the opportunity to refute the respondent's interpretation of the 1941 ANSI standard with the most persuasive evidence available: the successor standard. *Second*, the evidence before the jury conveyed the erroneous impression that the petitioners' product did not comply with industry standards when, in fact, the laundry press did comply with the industry standard in effect at the time of the occurrence.

In making the significant determination that the 1972 ANSI standard was not admissible, the Court of Appeals did not critically evaluate the impact of the Federal Rules of Evidence in its choice of law. Rather, the Court of Appeals

supported its selection of state law solely by reference to its own decision in *Fabian* v. *E. W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978). The *Fabian* decision is noteworthy only because it is as devoid of supremacy clause analysis as is the Court of Appeals' opinion in the instant case. In neither opinion did the court below explain why it had chosen to ignore the Federal Rules of Evidence in a diversity action.[2]

On the other hand, the circuit courts which have acknowledged the existence and validity of the Federal Rules of Evidence have held that the admissibility of evidence in a diversity action must be determined by those rules. In *Stonehocker* v. *General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978), the district court had excluded from evidence federal safety standards regarding automobile design because the standards were adopted after both the manufacture of the subject automobile and the occurrence. The Court of Appeals reversed that ruling and held that the federal safety standards were admissible under the Federal Rules of Evidence. The Fourth Circuit first noted the possible tension between the Federal Rules of Evidence and this Court's decision in *Erie, supra*, but concluded that it did not have to resolve that tension because it found no state law which controlled the admissibility of such a government regulation. In the absence of state law, the Court of Appeals tested the admissibility of the safety standards under the Federal Rules of Evidence and found them to be admissible, even though the safety standards were adopted after the occurrence in question.

The decision of the Fourth Circuit in *Stonehocker, supra*, conflicts with the decision of the court below on two impor-

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[2]The court below is not alone in this regard. The Court of Appeals for the First Circuit held in *McKinnon* v. *Skil Corp.*, 638 F.2d 270 (1st Cir. 1981), that the admissibility of an OSHA safety regulation is to be determined under state law in a products liability action. As in this case, the court in *McKinnon* simply ignored the Federal Rules of Evidence without explanation.

tant points. *First*, in the absence of controlling state law, the court in *Stonehocker* measured the admissibility of the standards against the Federal Rules of Evidence, whereas the court below measured the admissibility of the standards against what it thought state law would be. *Second*, the court in *Stonehocker* found standards adopted after the occurrence to be relevant and admissible, whereas the court below found standards adopted before the occurrence to be irrelevant and inadmissible.

The supremacy of the Federal Rules of Evidence was also addressed by the Fifth Circuit's decision in *Johnson* v. *William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950 (5th Cir. 1979), *modified*, 609 F.2d 820, 821 (5th Cir. 1980), wherein the court held that in diversity cases "the Federal Rules of Evidence govern the admissibility of evidence in the federal courts." The plaintiff in *Johnson* sought to have numerous government codes and industry standards admitted into evidence. The district court excluded the evidence based upon the applicable state law. The Court of Appeals found the district court's reliance on state law to be improper and held that the Federal Rules of Evidence, not state law, controlled the admissibility of those codes and standards. The Fifth Circuit reaffirmed its decision in *Rabon* v. *Automatic Fasteners, Inc.*, 627 F.2d 1231 (5th Cir. 1982), wherein it held that the Federal Rules of Evidence govern the admissibility of OSHA regulations in a diversity action.

Similarly, in *Murphy* v. *L&J Press Corp.*, 558 F.2d 407 (8th Cir. 1977), the Court of Appeals for the Eighth Circuit held in a strict products liability diversity action involving a punch press that the admissibility of ANSI standards and OSHA regulations were to be determined under Rule 402 of the Federal Rules of Evidence. In *Pollard* v. *Metropolitan Life Insurance Co.*, 598 F.2d 1284 (3d Cir.), *cert. denied*, 444 U.S. 917 (1979), the Court of Appeals for the Third Circuit held that in a diversity action to recover benefits under a life insurance policy, the Federal Rules of Evidence govern the admissibility of a decedent's death certificate, coroner's certificate, and

pathologist's report. *See also In re Air Crash Disaster*, 526 F. Supp. 226 (N.D. Ill. 1981). The rulings of the circuit courts in *Stonehocker, Johnson, Murphy*, and *Pollard* are in conflict with the First and Tenth Circuits' decisions holding that the admissibility of evidence of compliance with industry standards in a diversity action is to be determined under state law.[3]

The rulings of the Third, Fourth, Fifth, and Eighth Circuits discussed above are based on those courts' interpretation of the Court's decision in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). As we have shown above, analysis under *Erie* appears to be unnecessary in light of the effect of the supremacy clause on the applicability of the statutory Rules of Evidence. Even if the analysis followed by the Court in *Erie* and in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), were applicable to whether the Federal Rules of Evidence govern the admissibility of evidence of a product's compliance with industry standards, the same result would obtain. The issue as to whether such evidence is admissible can only be classified as one of "procedure." 10 Moore's Federal Practice § 57, at 88. Accordingly, even if the distinction drawn by the Rules Enabling Act of 1934 were germane, the Federal Rules of Evidence would govern the admissibility of this type of evidence.

The conflict between the circuits reflected in *Stonehocker, Johnson, Murphy*, and *Pollard* on one side and the decision of the court below and *Skil* on the other side as to the role to be played by the Federal Rules of Evidence in a diversity action requires that a writ of certiorari issue to resolve the conflict. Although the Federal Rules of Evidence expressly left

[3]To the extent the Court of Appeals' decision is based on its alternative ground that the 1972 ANSI standard was excludable under Fed. R. Evid. 403 on the issue of feasibility of alternate designs, it is in further conflict with the decisions in *Stonehocker, Johnson*, and *Murphy* and with its own ruling that a 1972 OSHA standard that was proposed but never adopted was admissible.

certain evidentiary questions to be resolved under state law (*e.g.*, the existence of a privilege, see Fed. R. Evid. 501), Congress certainly intended that the Federal Rules of Evidence would be controlling in all other instances. See Rule 1101 of the Federal Rules of Evidence. The plain objective of the statute is to create a uniform code of evidence to be used in the federal courts. The extent to which that uniform code can be enforced should be defined by this Court so that evidentiary questions such as the one presented here are not decided inconsistently by the district and circuit courts.

II. THE COURT OF APPEALS' INTERPRETATION OF KANSAS LAW DISREGARDS THE CONTROLLING DECISION OF THE KANSAS SUPREME COURT

Assuming, *arguendo*, that the Court of Appeals correctly concluded that the admissibility of the 1972 ANSI standard was governed entirely by reference to state law, the court was then obligated under *Erie* to apply the law of Kansas, even if it disagreed with the result. *American Employers Insurance Co.* v. *Carney*, 391 F.2d 551 (5th Cir. 1968). The Court of Appeals disregarded that obligation here.

The issue of the admissibility of industry standards in a strict products liability action was addressed by the Kansas Supreme Court in *Jones* v. *Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976). The subject of *Jones* v. *Hittle* was a gas explosion. The plaintiffs in *Jones* v. *Hittle* asserted liability against the defendant on four separate theories; negligence, strict liability in tort, breach of implied warranty, and absolute liability.

Under the strict products liability claim, the plaintiffs claimed the product, propane gas, was not sufficiently odorized and that the absence of odorization "constitutes a defect in the product so as to impose strict liability in tort...." *Id.* at 630, 549 P.2d at 1388. The defendants showed that the gas had been odorized to the level required by a state regulation. The Kansas Supreme Court was thus

required to determine the relevance of defendants' products' compliance with a state regulation to the plaintiffs' strict products liability claim.

The Kansas Supreme Court began its analysis of this issue by stating:

> "Although this court has not dealt with compliance with statutes and regulations as showing due care (*or lack of defect*), we have recently considered compliance with industry standards as bearing on the same elements."

Id. at 632, 549 P.2d at 1389 (emphasis added). After reviewing its prior decision establishing that compliance with industry standards is evidence of due care in a design negligence case, the Kansas Supreme Court held:

> "We think the same rule should apply to the standard set by the legislature (or by regulations having the effect of law) as to those set by an industry. *Compliance is evidence* of due care and *that the conforming product is not defective,* and may be conclusive in the absence of a showing of special circumstances."

Id. at 632, 549 P.2d 1390 (emphasis added). The Kansas Supreme Court then affirmed the summary judgment entered against the plaintiff on the strict liability theory.

Despite this holding by the Kansas Supreme Court of the relevance of a product's compliance with industry standards and government regulations to a strict products liability claim, the Court of Appeals stated in its first opinion that "no Kansas Court to date has addressed this issue [of the admissibility of industry standards in a strict liability case]." (A-11 n.17). Because it apparently found no state law on point, the Court of Appeals conducted its own analysis of the law of products liability and concluded that "the issue of manufacturer compliance with industry standards is irrelevant to strict liability analysis." (A-12).

The Court of Appeals attempted to distinguish the Kansas Supreme Court's decision in *Jones* v. *Hittle* by stating that the claims raised therein "were founded on *negligence* and not *strict liability.*" (A-12) (emphasis in original). That distinction is spurious. In *Jones* v. *Hittle*, the plaintiff had asserted a strict products liability claim, the Kansas Supreme Court affirmed the entry of summary judgment on that claim, and the Kansas Supreme Court expressly held: "Compliance [with industry or government standards] is evidence . . . that the conforming product is not defective, and may be conclusive in the absence of a showing of special circumstances." 219 Kan. at 632, 549 P.2d at 1390. Thus, in its first opinion, the court below misconstrued *Jones* v. *Hittle*; the only question remaining was whether the misconstruction was inadvertent or intentional.

When the misconstruction was noted in the petition for rehearing, the Court of Appeals modified its opinion and acknowledged that *Jones* v. *Hittle* involved a strict products liability claim. However, the Court of Appeals did not alter its holding that compliance with industry standards is irrelevant to a strict products liability claim under Kansas law. (A-27). This superficial response to the petition for hearing makes it obvious that the Court of Appeals intentionally misconstrued *Jones* v. *Hittle*.

There is only one plausible explanation for the intransigence of the Court of Appeals on this issue: it does not agree with the willingness of the Kansas Supreme Court to admit evidence of a product's compliance with industry standards. Yet, under *Erie*, a federal court has no right to judge the wisdom of state law. It must apply the state law as it exists. Evidence of the compliance of petitioner's product with the 1972 ANSI standard was admissible under Kansas law as expressed in *Jones* v. *Hittle* and the court below violated *Erie* by ignoring that state supreme court decision.

This Court's decision in *Erie* had two principal objectives: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, *supra*,

380 U.S. at 468. The decision below, if it is permitted to stand, will thwart both objectives. It encourages forum shopping because a plaintiff who is claiming that a product is defective will file in federal court if the product complies with an industry standard but will file in state court if the product does not comply, so as to benefit from the different interpretations of the state law evidentiary standard that will be applied. It leads to the inequitable administration of the laws because in light of the Court of Appeals' disdain for both the Federal Rules of Evidence and Kansas law, the evidence of compliance of a product with industry standards is admissible in other federal courts and in Kansas state courts, but not in a federal court in Kansas. There is no rational basis for such disparate treatment.

The Court of Appeals' misconstruction of state law and the conflict among the lower federal courts about the admissibility of evidence in a strict products liability action reflects the burgeoning products liability litigation in the federal court system. According to the Annual Reports of the Director of the Administrative Office of the United States Courts, the number of product liability suits filed in the district courts has mushroomed from 1,579 in 1974 to 9,071 in the year ending June 30, 1981. Administrative Office of the United States Courts, Annual Report 218 (1975); Administrative Office of the United States Courts, Annual Report 67 (1981). This growth has been fueled, in part, by opinions such as the decision of the Court of Appeals which induce plaintiffs to file suit in a district court in an attempt to obtain a more favorable construction of state law than they would receive in state court.

In light of the volume of products liability litigation in the federal courts and the adoption of the Federal Rules of Evidence, it is important for this Court to define the role of the federal courts in such litigation. If there is to be a federal common law of products liability, as the Court of Appeals' decision implies, then this Court should establish the elements of that tort. If state law provides the rules of

evidence for such claims, as the decision states, then the lower federal courts must be reminded of their obligation to adhere to state law as expressed by the state's highest appellate panel. Finally, if the Federal Rules of Evidence are applicable to such claims, then this Court must establish the evidentiary guidelines for those claims.

III. THE DECISION BELOW IS ANTITHETICAL TO THE FAIR AND ORDERLY ADMINISTRATION OF JUSTICE.

This case centered on an occurrence for which there was no plausible explanation, other than the routine activation of the press, which the respondent denied. Consequently, the jury was presented with two seemingly innocent parties—the injured respondent and the corporate manufacturer. The respondent's counsel upset this delicate balance by referring in the presence of the jury during cross-examination to other claims for serious personal injuries which had been made against the petitioners. While these other claims were irrelevant, a fact of which the respondent's counsel was aware before he made the comments, the jury was left with the understanding that the instant case was simply one of a series of such occurrences. The presumption of innocence to which the petitioners were entitled had been levelled.

The Court of Appeals held that the remarks by the respondent's counsel were, at most, harmless error. That holding was premised on the Court of Appeals' conclusion that the respondent's counsel acted in good faith and its belief that the district court's instruction to the jury that the remarks of counsel were not evidence cured any error. However, the respondent's counsel did not act in good faith; even the respondent conceded that several of the claims to which her counsel referred during trial were irrelevant. Moreover, the good faith of the respondent's counsel is irrelevant because the prejudicial impact of his remarks on the jury remains unchanged regardless of his motives.

The district court's instruction to the jury was equally unavailing. As the court recognized in *O'Rear* v. *Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977):

> "[T]he cleansing effect of the cautionary instructions in this case is dubious for, as the trial judge himself observed during the trial, '[y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.' "

This candid acknowledgment of the limited usefulness of an instruction to disregard counsel's comments parallels an observation made by Justice Frankfurter:

> "Unfortunately the passion and prejudice systematically instilled during the course of a trial cannot be exorcised by the general, placid language of a charge after the mischief is done. (Every experienced lawyer knows that it is idle to ask jurors to dismiss from their memory what has been deposited in their feelings.)"

F. Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis*, in *The Law as Literature* 118 (E. London ed. 1960). Where, as here, there is a distinct pattern of improper conduct which prejudices a jury, the simple instruction that remarks of counsel are not evidence offers no relief to the disadvantaged party.

Thus, neither counsel's intent nor the jury instruction could negate the feelings aroused by counsel's remarks. The petitioners were victimized by those feelings. It is fundamentally unfair to permit such conduct to taint the deliberations of a jury. The unwillingness of the court below to remedy the problem was inexcusable.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

BYRON L. GREGORY
Counsel for Petitioners

OF COUNSEL:

STEVEN H. HOEFT
ROGER W. WENTHE
MCDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000

In The

United States District Court

For the District of Kansas

OK NYO REXRODE,

Plaintiff,

v.

AMERICAN LAUNDRY PRESS COMPANY and its successor corporation, McGRAW-EDISON COMPANY,

Defendant.

Civil Action No. 78-4207

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, The Honorable Dale E. Saffels, United States District Judge presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

We, the jury, present the following answers to the questions submitted by the Court:

1. We find the defendant McGraw-Edison Company liable on the theory of strict liability;

2. We find the plaintiff Ok Nyo Rexrode not liable for negligence;

3. We find plaintiff's employer United States of America not liable for negligence;

4. Considering the contributions of all parties found liable in the above questions at one hundred percent we find the following percentages of the total fault attributable as follows:

McGraw-Edison Company	100%	(0 to 100%)
Ok Nyo Rexrode	0%	(0 to 100%)
United States of America	0%	(0 to 100%)
TOTAL	100%	(0 or 100%)

IT IS ORDERED AND ADJUDGED that the plaintiff Ok Nyo Rexrode recover of the defendant McGraw-Edison Company the sum of $750,000.00 with interest thereon at the rate of eight percent as provided by law, and her costs of action.

Dated this 30th day of June, 1980 at Kansas City, Kansas.

ARTHUR G. JOHNSON, CLERK

Linda Serven, Deputy Clerk

Publish

United States Court of Appeals

Tenth Circuit

No. 80-2217

OK NYO REXRODE,
Plaintiff-Appellee,
UNITED STATES OF AMERICA,
Intervenor,
v.
AMERICAN LAUNDRY PRESS CO., and its successor corporation McGRAW-EDISON COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the District of Kansas (D.C. CIV No. 78-4207)

Jerry K. Levy of Levy and Freeman, Topeka Kansas (Steven Hornbaker of Harper & Hornbaker, Chartered, Junction City, Kansas, with him on the brief), for Plaintiff-Appellee.

C. Willing Browne of Gorsuch, Kirgis, Campbell, Walker and Grover (Robert E. Musgraves, Denver, Colorado, and J. Steven Pigg and Donald Patterson of Fisher, Patterson, Sayler & Smith, Topeka, Kansas, with him on the brief), for Defendant-Appellant.

Before SETH, Chief Judge, and McWILLIAMS and SEYMOUR, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is a products liability case with jurisdiction based on diversity of citizenship. 28 U.S.C. § 1332 (1976). A jury returned a verdict in favor of the plaintiff, Ok Nyo Rexrode, and against the defendant, American Laundry Press Company, and its successor corporation, McGraw Edison Company, in the amount of $750,000. McGraw Edison appeals the judgment entered against it.[1]

The plaintiff, Mrs. Rexrode, was employed by the United States in a government-operated laundry facility located at Fort Riley, Kansas. She was injured on August 17, 1977, at the Fort Riley laundry when a laundry press manufactured by the defendant's predecessor closed on her hand while she was operating it.[2] The press was sold to the United States by the American Laundry Press Company on or about June 1, 1959, and was installed and continually used thereafter by the United States at its Fort Riley facility.

Mrs. Rexrode, who sustained severe injuries in the accident, brought the present action against the manufacturer of the press, and its successor company, claiming that the press was manufactured and sold in an unreasonably

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[1]The United States of America intervened in this action as a party plaintiff pursuant to Fed. R. Civ. 24(a)(1) and 42 U.S.C. § 2651 (1976). 42 U.S.C. § 2651 authorizes the United States to recover from third-party tortfeasors the reasonable value of medical costs and treatment the government has furnished to injured persons. Subsection (b) of § 2651 provides that the United States may enforce its right to recovery, *inter alia*, by intervening in any action brought by the injured person against the third-party tortfeasor. The United States incurred expenses totaling $17,570 on behalf of Mrs. Rexrode, who was a military dependent, and that amount was deducted from her award.

[2]The press was in fact manufactured by the Ajax Pressing Machine Company which was acquired by American Laundry Press prior to 1959. In 1967 the Ajax Division of American Laundry Press merged with the McGraw Edison Company and the successor corporation became known as McGraw Edison.

dangerous and defective condition.[3] On appeal, the defendant presents four issues for review. We shall discuss each.

I. OTHER ACCIDENTS

The machine used by Mrs. Rexrode was Model 1057 PY-SP yoke press which had a main control mechanism assembly known as "A 178." The press is activated when the operator depresses two red buttons located at opposite ends of the press head. As a safety precaution, the red buttons are spaced so that two hands are required to engage the main control assembly mechanism.

Depressing both red buttons opens two pneumatic valves to permit air to fill a cylinder which in turn drives the press head downward. The operator must continuously engage both red buttons as the press head descends until the press

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[3] Kansas has adopted the rule of strict liability as set forth in § 402A of the Restatement (Second) of Torts (1965). *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104, 1108 (1976). That section provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold,
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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reaches the "lock position," approximately four inches above the buck. Once the machine enters the lock mode, the press will close automatically and the operator may release the red buttons.[4] Activating either one of two green buttons, also located on the press head, will cause the head to ascend immediately.

Mrs. Rexrode alleged in this case that the press head descended on her hand even though she had not activated the two red operating buttons which normally must be depressed before the head will move toward the buck.

In order to ascertain whether other cases existed in which plaintiffs were injured when a press head descended mysteriously, the plaintiff propounded interrogatories to the defendant requesting information regarding past and present injury claims filed against the defendant involving laundry presses with "the same or similar main control mechanism assembly" as the press which was the subject of the suit.[5] The defendant initially responded to these interrogatories by stating that it was unaware of any suits or claims involving "the model press which is the subject matter of this law suit." Dissatisfied with that answer, plaintiff filed a motion to compel answers, which was granted on July 30, 1979. The defendant then filed a supplemental answer in which it stated that there were two such cases. A second supplemental answer listed an additional eleven cases in which persons had been injured by a laundry press with the same or similar main control mechanism assembly. A third supplemental answer listed one additional suit, bringing the total to fourteen lawsuits involving claims against the defendant which were possibly similar to plaintiff's claim.

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[4] Requiring two hands to operate the press until the head reaches the lock position prevents operators from trying to "beat the ram." Testimony at trial indicated that it is impossible to beat the ram once the machine enters the lock mode.

[5] Apparently, the "A-178" main control mechanism assembly was used on many other models, and on larger presses as well as yoke presses.

On January 16, 1980, the plaintiff filed a notice to take the deposition and request for production of documents of George Schmidlin, an attorney employed by the defendant. A hearing for protective order in response to this notice was held on February 6, 1980. The court at that time ordered the defendant to produce all files of claims, exclusive of privileged communications, involving Ajax Press Machine Company presses which used a system of depressing two press head buttons simultaneously and an A-178 or A-220[6] main control mechanism assembly. Accordingly, the defendant was required to produce answers to interrogatories from the 1977 case of *Miles* v. *American Laundry Machinery Industries*, a case which was discovered in the files which Mr. Schmidlin brought to the February 12, 1980, deposition. Interrogatory 16 of the *Miles* case requested that the defendant list all prior suits or claims for damages filed against the defendant alleging injuries occasioned by similar products. The answer listed seventeen cases, only two of which had been identified previously in the defendant's supplemental answers to the plaintiff's interrogatories.[7]

On the first day of trial, the defendant filed a motion *in limine* seeking the exclusion of evidence relating to other claims and lawsuits against the defendant.[8] The defendant argued that testimony regarding additional press accidents should not be admitted at all, unless and until the plaintiff

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[6] Ajax replaced the "A-220" assembly with the "A-178" assembly sometime between 1956 and 1958.

[7] We recognize that the subject matter of the *Miles* interrogatory request was much broader than the trial court's protective order of February 6, 1980, in this case.

[8] Defendant's motion *in limine* reads as follows:

> Comes now the defendant and moves the Court for an order prohibiting plaintiff's counsel from making reference to any suits filed against the defendant or American Laundry Machinery Company, its division, concerning others who have been injured on presses manufactured by it, for the reason that such reference

demonstrated that the other accidents were sufficiently similar to the one at bar to be relevant.[9] The court ruled that no other press accident cases would be allowed into evidence unless proof of the circumstances involved could be established by direct testimony of a witness with first-hand knowledge of the case, and unless relevancy was established by evidence that the other accident involved substantially the same circumstances as the present case.[10]

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in opening statement, voir dire examination, examination of any witness, is irrelevant, immaterial, inadmissible, and highly prejudicial unless and until the qualifications set forth on page 14 of Defendant's Trial Brief, and its Supplemental Trial Brief on Admissibility of Other Suits against the Defendant are met.

[9]Under both federal and Kansas law, it is clear that evidence of the occurrence of other accidents involving substantially the same circumstances as the case at issue is admissible, pursuant to a strict liability theory, to establish notice, the existence of a defect, or to refute testimony by a defense witness that a given product was designed without safety hazards. *McKinnon* v. *Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981); *Wojciechowski* v. *Long-Airdox Div. of Marmon Group, Inc.*, 488 F.2d 1111, 1116 (3d Cir. 1973); *Jones & Laughlin Steel Corp.* v. *Matherne*, 348 F.2d 394, 401 (5th Cir. 1965); *Prashker* v. *Beech Aircraft Corp.*, 258 F.2d 602, 608 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958); *Schaeffer* v. *Kansas Department of Transportation*, 227 Kan. 509, 608 P.2d 1309, 1317 (1980). Admission of testimony regarding other accidents is usually predicated upon a showing that the circumstances surrounding them were substantially similar to those involved in the present case. *Julander* v. *Ford Motor Co.*, 488 F.2d 839 (10th Cir. 1973).

[10]After argument, the trial court inquired of defense counsel as to whether counsel for plaintiff wouldn't have the right to cross-examine defense expert witnesses who had investigated the "other claims," to which defense counsel replied: "Certainly. He hasn't asked those people any of those questions yet is my point." In this setting the trial

At trial, plaintiff's counsel was able to reveal to the jury the existence of several other press injury cases filed against the defendant by asking defense expert witnesses who had investigated some of the accidents whether they had worked on any of the cases which he would list orally by the caption name. Frequently, the witness had investigated some of the cases named, in which event counsel pursued the matter in an effort to demonstrate that the "other accidents" were comparable to the one sustained by the plaintiff. Where the witness stated that he had nothing to do with the investigation of a particular claim, however, counsel did not pursue the matter in any detail. Defense counsel interposed certain objections during this cross-examination, some of which were sustained. The objections which were overruled did not relate to matters of great import, and, to us, this particular line of cross-examination played a minor role in the trial. As illustrative of this, counsel for plaintiff in his closing argument to the jury made *no* mention of any other accident.

On appeal, counsel for the defendant, who did not participate in the trial, attempts to make much of the cross-examination of defendant's expert witnesses regarding other accidents and, indeed, urges the matter as his first and primary ground for reversal. Specifically, counsel asserts that the trial court erred by failing to require plaintiff's counsel to lay the necessary foundation *outside* the presence

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court granted the motion *in limine*, in part, with the following comment:

> I will tell you, I am going to partially grant this motion as to any instances that are only available through bare pleadings, then the Court directs that the plaintiff not refer to them in any manner. *However, that does not limit him on cross-examination or examination of witness that have been investigating cases of this type to, if they are similar and if he can make them relevant, then I think they have a probative value and they will be handled in that way.* And I direct counsel, and I know he will limit his opening statement to that restriction and we will have no problem. (emphasis added.)

of the jury before he made reference to other claims made against the defendant.

We are not persuaded by the argument. While we agree that it might be preferable to hold a hearing on the relevancy of other accidents outside of the jury's presence, we believe this approach is by no means mandated in every instance.[11] We are aware that the Supreme Court of Kansas has endorsed the procedure urged by the defendant here,[12] but the federal district court below was not bound by that endorsement, as the matter is one concerning procedural and not substantive law. *Hanna* v. *Plumer*, 380 U.S. 460 (1965); *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

Moreover, defendant's assertion that the effect of revealing names of other cases to the jury in this instance is tantamount to the error which occurred in *Julander* v. *Ford Motor Co.* is unavailing. In the *Julander* case, this Court reversed a lower court decision *to admit into evidence* complaints against the defendant, Ford, without determining whether the other steering defect claims had occurred under circumstances substantially similar to the case at issue. 488 F.2d 839, 845-47 (10th Cir. 1973). By contrast, defendant's objection here pertains to the mere mention of case names by the plaintiff's counsel in front of the jury.[13] This is not to say that statements by counsel can never have a prejudicial

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[11] Contrary to defendant's assertion, the trial court did not violate its own *in limine* order by failing to hold a separate hearing to determine the admissibility of evidence of other claims. The trial court's order makes no mention of a hearing outside of the presence of the jury, (see n. 10, *supra*), and a review of the record reveals that defendant below made no request for such procedure.

[12] *See Schaeffer* v. *Kansas Department of Transportation*, 227 Kan. 509, 608 P.2d 1309, 1317 (1980); *Hampton* v. *State Highway Commission*, 209 Kan. 565, 498 P.2d 236, 246 (1972).

[13] Statements made by counsel are, of course, not evidence and the jury was cautioned on that point in this case. Instruction No. 27.

impact on a jury verdict warranting reversal, *cf. Cleveland* v. *Peter Kiewit Sons' Co.*, 624 F.2d 749, 758 (6th Cir. 1980); *County of Maricopa* v. *Maberry*, 555 F.2d 207, 217-20 (9th Cir. 1977); *O'Rear* v. *Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977); however, it is our conclusion that this particular line of cross-examination played a minor role in the course of trial. Thus any error which occurred was harmless.

II. THE 1972 INDUSTRY STANDARD

At trial, plaintiff introduced evidence, without objection, of a 1941 safety standard relating to laundry presses established by the American National Standards Institute (ANSI)[14] and of a 1972 federal regulation proposed by OSHA.[15] All parties agreed that the Rexrode press violated the 1941 ANSI standard and the OSHA regulation with

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[14]The American National Standards Institute is an organization which publishes national nonmandatory standards for various products.

The 1941 ANSI standard for ironing presses provides that:

> Each ironing press (excluding hand or foot power) shall be equipped with an approved guard or means that will prevent the fingers of the operator or other person from being caught between the ironing surfaces.

[15]The regulation was promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (1976), which authorized the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.

The 1972 OSHA regulation is codified at 29 C.F.R. § 1910.212 under the heading of General Requirements for all machines:

> (a) *Machine guarding*—(1) *Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ...

regard to protection for nonoperators. Moreover, expert witnesses for the defendant conceded on cross-examination that had the press complied with the 1941 standard, Mrs. Rexrode would not have been severely injured.

Defendant contends that the 1941 industry standard, which was in effect at the time the press was manufactured in 1959, established safety standards beyond the state of the art of the industry at that time. Defendant in turn sought to introduce evidence of a less stringent 1972 ANSI standard, arguing that the press fully complied with its more technically feasible requirements.[16] The trial court on several occasions refused to admit the 1972 ANSI standard or to permit testimony regarding it. Defendant argues failure to admit the ANSI standard constituted reversible error.[17]

Defendant does not challenge either the admission of the 1972 OSHA standard or the 1941 ANSI standard.[18] It

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(3) *Point of operation guarding* (i) point of operation is the area on a machine where work is actually performed upon the material being processed.

This OSHA regulation imposes mandatory standards on *employers* and *employees*, and not manufacturers.

[16]The 1972 ANSI standard did not require point of operation guarding for nonoperators.

[17]The threshold question to be resolved is whether Kansas or federal law should be applied to determine the admissibility of subsequently promulgated industry standards in diversity design defect cases. In *Fabian* v. *E. W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978), this Court adopted the position that state evidentiary law will be applied to determine admissibility of industry standards in diversity strict liability cases. *Id.* at 1260-61. (by implication). As no Kansas court to date has addressed this issue, this Court must determine what result probably would be reached if the question were litigated in the state court. *Julander* v. *Ford Motor Co.*, 488 F.2d at 844.

[18]Nonetheless, it is clear that in determining an issue of defective design a jury properly may consider evidence that

claims, however, that it should have been permitted to introduce a 1972 ANSI standard to prove that "the machine was in full compliance with the more recent standards, and to demonstrate that the earlier standards were an inaccurate reflection of the state of the industry." We disagree.

First, the issue of manufacturer compliance with industry standards is irrelevant to a strict liability analysis. Rather, it relates to the question of a manufacturer's duty of care under a negligence theory. *See Raney* v. *Honeywell, Inc.*, 540 F.2d 932, 937-38 (8th Cir. 1976).

In each instance, saving one, in which the defendant in its brief has cited a case to support its assertion that the 1972 ANSI subsequent standard should have been admitted, reference to the case identified reveals that the claims involved were founded on *negligence* and not *strict liability*. *See, e.g., Stonehocker* v. *General Motors Corp.*, 587 F.2d 151, 157 (4th Cir. 1978); *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383, 1389-90 (1976); *Garst* v. *General Motors Corp.*, 207 Kan. 2, 484 P.2d 47, 61 (1971).[19]

The second prong of defendant's argument for admitting the 1972 ANSI standard relates to feasibility, a factor which we would agree is extremely relevant in a design defect determination. Manufacturers are not to be held strictly liable for failure to design safety features, if the technology to do so is unavailable at the time the product is made. *See generally* 96 A.L.R. 3d 22, 35-40 (1980).

The difficulty with defendant's argument here lies with the fact that in 1972 OSHA also proposed standards which

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a product violated safety standards which were in effect on the date of manufacture. *Davis* v. *Fox River Tractor Co.*, 518 F.2d 481, 484 (10th Cir. 1975).

[19]The case of *Clement* v. *Rousselle Corp.*, 372 So.2d 1156 (Dist. Ct. App. 1979), *cert. denied*, 383 So.2d 1191 (Fla. 1980), does support defendant's position. In this regard, however, *see Murphy* v. *L&J Press Corp.*, 558 F.2d 407, 411-12 (8th Cir. 1977). We are more persuaded by *Murphy*.

mandated the same protection as the 1941 standard. Moreover, in response to this OSHA proposal, defendant manufactured and marketed a safety device, the cable kit, which when installed would bring existing presses in compliance with the Act. Given that the plaintiff offered into evidence and proved the existence of the 1972 OSHA standard and the cable kit, which was marketed by the defendant, defendant's proffer of the 1972 ANSI standard to establish that in 1972 certain safety measures were infeasible was untenable.[20]

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[20] To prove defendant had the capability to manufacture guards for presses which complied with the 1972 OSHA requirements of point of operation guards for nonoperators as well as operators, plaintiff introduced the following correspondence, sent by the defendant to its field representatives on February 11, 1972:

> "The Williams-Steiger Occupational Safety & Health Act requires that certain safety devices be incorporated on all laundry presses.
>
> The law requires that all presses shipped from our factory after February 15, 1972, be equipped with these devices. It requires that all presses in use in the field be so equipped.
>
> The penalties are heavy for violation! It is very important that all dealers and distributors have a good understanding of the requirements; and, in all their proposals to customer, take into consideration the added cost necessary to comply with the law.
>
> Each dealer or distributor should appraise his inventory of equipment on hand in his warehouse which was shipped from AJAX prior to February 15, 1972, and determine for himself if it is necessary to so equip these presses before they are delivered.
>
> AJAX has developed a kit for the various laundry presses that we manufacture and to the best of our knowledge complies with the Act. We also have available a kit that can be adapted to competitive presses.
>
> The kit consists of a cable that extends around the head of the press which, when it comes in contact with

Similarly, any relevance which the 1972 ANSI standard might have had to prove the technological infeasibility within the industry to comply with the 1941 ANSI standard *in 1959* was at best remote. Indeed, at trial the court sustained an objection by the defendant to the introduction of a 1961 ANSI standard as irrelevant "post-sale" evidence (T.R. 160). In our opinion, the trial judge properly excluded the 1972 ANSI standard under Rule 403 of the Federal Rules of Evidence, as it was of limited relevance and likely to confuse the jury. *See Rigby* v. *Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir. 1977).

III. INSTRUCTION NO. 24

Defendant also appeals Jury Instruction No. 24 in which the court stated that plaintiff's life expectancy as of the date of the accident was 29.2 years. The judge indicated that the figure was given for the purpose of assisting the jurors in the computation of future damages and losses. Defendant complains that this instruction directed the jury to compute plaintiff's future losses and damages from the date of accident rather than from the date of trial, thus allowing double recovery for the interim between accident and trial. We disagree.

The instructions should be read together, as a whole, in determining whether a party was prejudiced by them. The trial court properly instructed the jury to compute separately damages for pain and suffering, medical expenses, and loss of income accrued, and future damages. In light of such instructions, we assume that the jury recognized the distinction between damage already incurred, and future damage, and,

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the operator's hand or a second party's hand, will immediately return the press to an open position. The press must then be reset to continue operation.

The enclosed sketch gives you further information and a description of how this device operates, together with list prices. . . ."

in connection with the latter, adjusted downward the life expectancy figure so as to give effect to the fact that there was a three-year interval between the date of accident and the date of trial. At least we are unwilling to assume the contrary. *Rasmussen Drilling, Inc.* v. *Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir. 1978).

IV. INSUFFICIENCY OF EVIDENCE

Defendant's final contention is that the evidence is legally insufficient to support the verdict. Counsel asserts that plaintiff's evidence only established that she suffered a hand injury when, for some inexplicable reason, the press head descended. In our view, the plaintiff's evidence showed much more than just that. The plaintiff offered expert testimony to establish a design defect under several different theories, including, failure to install a so-called cable kit, or perimeter wire, which would cause the press head to rise if it contacted a part of an arm or a hand.[21] Defendant's experts

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[21] At trial plaintiff introduced evidence of possible defective design under the following theories:

1. The theory that the machine was defective because it was not equipped with the so-called cable kit, or perimeter wire, which would cause the head to ascend if it contacted part of an arm or hand.

2. The theory that the mysterious descent of the head, when coupled with proof of normal maintenance and lack of substantial alteration, established that some defect must have existed.

3. The theory that one of the valves which opens to permit air to fill the cylinder which in turn drives the press head downward became stuck open when a particle momentarily lodged in its port. Defendant demonstrated that the likelihood the accident occurred in this fashion is negligible, since the press head would not have ascended upon depression of the green button, as Rexrode testified it did, until the foreign matter was removed from the valve.

4. The theory that failure to design the press to include a nonadjustable safety rod contributed to the

conceded that Mrs. Rexrode would not have been injured if the press had been equipped with a safety cable kit.

Plaintiff also introduced evidence tending to prove that defendant failed to include adequate maintenance instructions and warnings with the press when it was shipped to Fort Riley in 1959 for installation. Defendant presented evidence that the Humpfrey valve, upon which the cable kit design was predicated, was not developed until the 1960's. However, the jury was instructed to consider feasibility and the "state of the art" for the industry at the time the press was manufactured. The mere fact of continuous use of a product without injury is not, by itself, conclusive evidence that the product was not defective. *Sterner AERO AB* v. *Page Airmotive, Inc.*, 499 F.2d 709 (10th Cir. 1974). In short, in considering the evidence in a light most favorable to the plaintiff, drawing all reasonable inferences and resolving all factual conflicts in accord with support for the verdict, *Gardner* v. *General Motors Corp.*, 507 F.2d 525, 527 (10th Cir. 1974), it cannot be said that plaintiff failed to advance evidence sufficient to require submission of the matter to the jury. The evidence supports the verdict.

Judgment affirmed.

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plaintiff's injury. Rexrode presented evidence that use of an adjustable rod allowed the machine to be set so that it went into the lock position some distance above the pressing surface. Once the press locks, the press head will descend without depression of the red buttons.

Defendant introduced some proof that this particular defect, if it was indeed a design error at all, could not have been the cause in fact of the Rexrode accident.

5. The theory that the machine was defective because the defendant's predecessor delivered it to Fort Riley without adequate maintenance instructions and warnings. Plaintiff also argued that defendant violated a continuing duty to warn by failing to notify Fort Riley directly of a new safety feature, the cable kit, which it had developed.

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United States Court of Appeals

Tenth Circuit

No. 80-2217

OK NYO REXRODE,
Plaintiff-Appellee,
UNITED STATES OF AMERICA,
Intervenor,
v.
AMERICAN LAUNDRY PRESS CO., and its successor corporation McGRAW-EDISON COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the District of Kansas (D.C. CIV No. 78-4207)

Jerry K. Levy of Levy and Freeman, Topeka, Kansas (Steven Hornbaker of Harper & Hornbaker, Chartered, Junction City, Kansas, with him on the brief), for Plaintiff-Appellee.

C. Willing Browne of Gorsuch, Kirgis, Campbell, Walker and Grover (Robert E. Musgraves, Denver, Colorado, and J. Steven Pigg and Donald Patterson of Fisher, Patterson, Sayler & Smith, Topeka, Kansas, with him on the brief), for Defendant-Appellant.

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[1]The United States of America intervened in this action as a party plaintiff pursuant to Fed. R. Civ. 24(a)(1) and 42 U.S.C. § 2651 (1976). 42 U.S.C. § 2651 authorizes the United States to recover from third-party tortfeasors the reasonable value of medical costs and treatment the government has furnished to injured persons. Subsection (b) of § 2651 provides that the United States may enforce its right to recovery, *inter alia*, by intervening in any action brought by the injured person against the third-party tortfeasor. The United States incurred expenses totaling $17,570 on behalf of Mrs. Rexrode, who was a military dependent, and that amount was deducted from her award.

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[6] Ajax replaced the "A-220" assembly with the "A-178" assembly sometime between 1956 and 1958.

[7] We recognize that the subject matter of the *Miles* interrogatory request was much broader than the trial court's protective order of February 6, 1980, in this case.

[8] Defendant's motion *in limine* reads as follows:

> Comes now the defendant and moves the Court for an order prohibiting plaintiff's counsel from making reference to any suits filed against the defendant or American Laundry Machinery Company, its division, concerning others who have been injured on presses manufactured by it, for the reason that such reference in opening statement, voir dire examination, examination of any witness, is irrelevant, immaterial, inadmissible,

argued that testimony regarding additional press accidents should not be admitted at all, unless and until the plaintiff demonstrated that the other accidents were sufficiently similar to the one at bar to be relevant.[9] The court ruled that no other press accident cases would be allowed into evidence unless proof of the circumstances involved could be established by direct testimony of a witness with first-hand knowledge of the case, and unless relevancy was established by evidence that the other accident involved substantially the same circumstances as the present case.[10]

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and highly prejudicial unless and until the qualifications set forth on page 14 of Defendant's Trial Brief, and its Supplemental Trial Brief on Admissibility of Other Suits against the Defendant are met.

[9]Under both federal and Kansas law, it is clear that evidence of the occurrence of other accidents involving substantially the same circumstances as the case at issue is admissible, pursuant to a strict liability theory, to establish notice, the existence of a defect, or to refute testimony by a defense witness that a given product was designed without safety hazards. *McKinnon* v. *Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981); *Wojciechowski* v. *Long-Airdox Div. of Marmon Group, Inc.*, 488 F.2d 1111, 1116 (3d Cir. 1973); *Jones & Laughlin Steel Corp.* v. *Matherne*, 348 F.2d 394, 401 (5th Cir. 1965); *Prashker* v. *Beech Aircraft Corp.*, 258 F.2d 602, 608 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958); *Schaeffer* v. *Kansas Department of Transportation*, 227 Kan. 509, 608 P.2d 1309, 1317 (1980). Admission of testimony regarding other accidents is usually predicated upon a showing that the circumstances surrounding them were substantially similar to those involved in the present case. *Julander* v. *Ford Motor Co.*, 488 F.2d 839 (10th Cir. 1973).

[10]After argument, the trial court inquired of defense counsel as to whether counsel for plaintiff wouldn't have the right to cross-examine defense expert witnesses who had investigated the "other claims," to which defense counsel replied: "Certainly. He hasn't asked those people any of those questions yet is my point." In this setting the trial court granted the motion *in limine*, in part, with the following comment:

At trial, plaintiff's counsel was able to reveal to the jury the existence of several other press injury cases filed against the defendant by asking defense expert witnesses who had investigated some of the accidents whether they had worked on any of the cases which he would list orally by the caption name. Frequently, the witness had investigated some of the cases named, in which event counsel pursued the matter in an effort to demonstrate that the "other accidents" were comparable to the one sustained by the plaintiff. Where the witness stated that he had nothing to do with the investigation of a particular claim, however, counsel did not pursue the matter in any detail. Defense counsel interposed certain objections during this cross-examination, some of which were sustained. The objections which were overruled did not relate to matters of great import, and, to us, this particular line of cross-examination played a minor role in the trial. As illustrative of this, counsel for plaintiff in his closing argument to the jury made *no* mention of any other accident.

On appeal, counsel for the defendant, who did not participate in the trial, attempts to make much of the cross-examination of defendant's expert witnesses regarding other accidents and, indeed, urges the matter as his first and primary ground for reversal. Specifically, counsel asserts that the trial court erred by failing to require plaintiff's counsel to lay the necessary foundation *outside* the presence of the jury before he made reference to other claims made against the defendant.

I will tell you, I am going to partially grant this motion as to any instances that are only available through bare pleadings, then the Court directs that the plaintiff not refer to them in any manner. *However, that does not limit him on cross-examination or examination of witness that have been investigating cases of this type to, if they are similar and if he can make them relevant, then I think they have a probative value and they will be handled in that way.* And I direct counsel, and I know he will limit his opening statement to that restriction and we will have no problem. (emphasis added.)

We are not persuaded by the argument. While we agree that it might be preferable to hold a hearing on the relevancy of other accidents outside of the jury's presence, we believe this approach is by no means mandated in every instance.[11] We are aware that the Supreme Court of Kansas has endorsed the procedure urged by the defendant here,[12] but the federal district court below was not bound by that endorsement, as the matter is one concerning procedural and not substantive law. *Hanna* v. *Plumer*, 380 U.S. 460 (1965); *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

Moreover, defendant's assertion that the effect of revealing names of other cases to the jury in this instance is tantamount to the error which occurred in *Julander* v. *Ford Motor Co.* is unavailing. In the *Julander* case, this Court reversed a lower court decision *to admit into evidence* complaints against the defendant, Ford, without determining whether the other steering defect claims had occurred under circumstances substantially similar to the case at issue. 488 F.2d 839, 845-47 (10th Cir. 1973). By contrast, defendant's objection here pertains to the mere mention of case names by the plaintiff's counsel in front of the jury.[13] This is not to say that statements by counsel can never have a prejudicial impact on a jury verdict warranting reversal, *cf. Cleveland* v. *Peter Kiewit Sons' Co.*, 624 F.2d 749, 758 (6th Cir. 1980); *County*

[11] Contrary to defendant's assertion, the trial court did not violate its own *in limine* order by failing to hold a separate hearing to determine the admissibility of evidence of other claims. The trial court's order makes no mention of a hearing outside of the presence of the jury, (see n. 10, *supra*), and a review of the record reveals that defendant below made no request for such procedure.

[12] *See Schaeffer* v. *Kansas Department of Transportation*, 227 Kan. 509, 608 P.2d 1309, 1317 (1980); *Hampton* v. *State Highway Commission*, 209 Kan. 565, 498 P.2d 236, 246 (1972).

[13] Statements made by counsel are, of course, not evidence and the jury was cautioned on that point in this case. Instruction No. 27.

of Maricopa v. *Maberry*, 555 F.2d 207, 217-20 (9th Cir. 1977); *O'Rear* v. Fruehauf Corp., 554 F.2d 1304, 1309 (5th Cir. 1977); however, it is our conclusion that this particular line of cross-examination played a minor role in the course of trial. Thus any error which occurred was harmless.

II. THE 1972 INDUSTRY STANDARD

At trial, plaintiff introduced evidence, without objection, of a 1941 safety standard relating to laundry presses established by the American National Standards Institute (ANSI)[14] and of a 1972 federal regulation proposed by OSHA.[15] All parties agreed that the Rexrode press violated the 1941 ANSI standard and the OSHA regulation with

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[14] The American National Standards Institute is an organization which publishes national nonmandatory standards for various products.

The 1941 ANSI standard for ironing presses provides that:

> Each ironing press (excluding hand or foot power) shall be equipped with an approved guard or means that will prevent the fingers of the operator or other person from being caught between the ironing surfaces.

[15] The regulation was promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (1976), which authorized the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.

The 1972 OSHA regulation is codified at 29 C.F.R. § 1910.212 under the heading of General Requirements for all machines:

> (a) *Machine guarding*—(1) *Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ...
>
> (3) *Point of operation guarding* (i) point of operation is the area on a machine where work is actually performed upon the material being processed.

regard to protection for nonoperators. Moreover, expert witnesses for the defendant conceded on cross-examination that had the press complied with the 1941 standard, Mrs. Rexrode would not have been severely injured.

Defendant contends that the 1941 industry standard, which was in effect at the time the press was manufactured in 1959, established safety standards beyond the state of the art of the industry at that time. Defendant in turn sought to introduce evidence of a less stringent 1972 ANSI standard, arguing that the press fully complied with its more technically feasible requirements.[16] The trial court on several occasions refused to admit the 1972 ANSI standard or to permit testimony regarding it. Defendant argues failure to admit the ANSI standard constituted reversible error.[17]

Defendant does not challenge either the admission of the 1972 OSHA standard or the 1941 ANSI standard.[18] It

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This OSHA regulation imposes mandatory standards on *employers* and *employees*, and not manufacturers.

[16]The 1972 ANSI standard did not require point of operation guarding for nonoperators.

[17]The threshold question to be resolved is whether Kansas or federal law should be applied to determine the admissibility of subsequently promulgated industry standards in diversity design defect cases. In *Fabian* v. *E. W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978), this Court adopted the position that state evidentiary law will be applied to determine admissibility of industry standards in diversity strict liability cases. *Id.* at 1260-61 (by implication). As no Kansas court to date has addressed this issue, this Court must determine what result probably would be reached if the question were litigated in the state court. *Julander* v. *Ford Motor Co.*, 488 F.2d at 844.

[18]Nonetheless, it is clear that in determining an issue of defective design a jury properly may consider evidence that a product *violated* safety standards which were in effect on the date of manufacture. *Davis* v. *Fox River Tractor Co.*, 518 F.2d 481, 484 (10th Cir. 1975).

claims, however, that it should have been permitted to introduce a 1972 ANSI standard to prove that "the machine was in full compliance with the more recent standards, and to demonstrate that the earlier standards were an inaccurate reflection of the state of the industry." We disagree.

First, the issue of manufacturer compliance with industry standards is generally considered to be irrelevant to a strict liability case. Rather, it relates to the question of the manufacturer's duty of care under the negligence theory. *See Raney* v. *Honeywell, Inc.*, 540 F.2d 932, 937-38 (8th Cir. 1976). In the main, the cases here relied on by the defendant involve claims based on negligence rather than strict liability. *See, e.g., Stonehocker* v. *General Motors Corp.*, 587 F.2d 151, 157 (4th Cir. 1978); *Garst v. General Motors Corp.*, 207 Kan. 2, 484 P.2d 47, 61 (1971).[19] *Jones v. Hittle Service Inc.*, 219 Kan. 627, 549 P.2d 1383, 1389-90 (1976), relied on by the defendant, holds that evidence of compliance by a defendant with a state regulation, which was stipulated to by the parties, does not conclusively prove that such defendant was not negligent or that the propane gas there involved was not defective. *Garst v. General Motors Corp., supra*, cited with approval in *Jones*, indicates that compliance with an industry practice tends to negate an allegation of negligence.

The second prong of defendant's argument for admitting the 1972 ANSI standard relates to feasibility, a factor which we would agree is extremely relevant in a design defect determination. Manufacturers are not to be held strictly liable for failure to design safety features, if the technology to do so is unavailable at the time the product is made. *See generally* 96 A.L.R. 3d 22, 35-40 (1980).

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[19] The case of *Clement v. Rousselle Corp.*, 372 So.2d 1156 (Dist. Ct. App. 1979), *cert. denied*, 383 So.2d 1191 (Fla. 1980), does support defendant's position. In this regard, however, *see Murphy v. L&J Press Corp.*, 558 F.2d 407, 411–12 (8th Cir. 1977). We are more persuaded by *Murphy*.

The difficulty with defendant's argument here lies with the fact that in 1972 OSHA also proposed standards which mandated the same protection as the 1941 standard. Moreover, in response to this OSHA proposal, defendant manufactured and marketed a safety device, the cable kit, which when installed would bring existing presses in compliance with the Act. Given that the plaintiff offered into evidence and proved the existence of the 1972 OSHA standard and the cable kit, which was marketed by the defendant, defendant's proffer of the 1972 ANSI standard to establish that in 1972 certain safety measures were infeasible was untenable.[20]

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[20] To prove defendant had the capability to manufacture guards for presses which complied with the 1972 OSHA requirements of point of operation guards for nonoperators as well as operators, plaintiff introduced the following correspondence, sent by the defendant to its field representatives on February 11, 1972:

> "The Williams-Steiger Occupational Safety & Health Act requires that certain safety devices be incorporated on all laundry presses.
>
> The law requires that all presses shipped from our factory after February 15, 1972, be equipped with these devices. It requires that all presses in use in the field be so equipped.
>
> The penalties are heavy for violation! It is very important that all dealers and distributors have a good understanding of the requirements; and, in all their proposals to customer, take into consideration the added cost necessary to comply with the law.
>
> Each dealer or distributor should appraise his inventory of equipment on hand in his warehouse which was shipped from AJAX prior to February 15, 1972, and determine for himself if it is necessary to so equip these presses before they are delivered.
>
> AJAX has developed a kit for the various laundry presses that we manufacture and to the best of our knowledge complies with the Act. We also have available a kit that can be adapted to competitive presses.

Similarly, any relevance which the 1972 ANSI standard might have had to prove the technological infeasibility within the industry to comply with the 1941 ANSI standard *in 1959* was at best remote. Indeed, at trial the court sustained an objection by the defendant to the introduction of a 1961 ANSI standard as irrelevant "post-sale" evidence. (T.R.160). In our opinion, the trial judge properly excluded the 1972 ANSI standard under Rule 403 of the Federal Rules of Evidence, as it was of limited relevance and likely to confuse the jury. *See Rigby* v. *Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir. 1977).

III. INSTRUCTION NO. 24

Defendant also appeals Jury Instruction No. 24 in which the court stated that plaintiff's life expectancy as of the date of the accident was 29.2 years. The judge indicated that the figure was given for the purpose of assisting the jurors in the computation of future damages and losses. Defendant complains that this instruction directed the jury to compute plaintiff's future losses and damages from the date of accident rather than from the date of trial, thus allowing double recovery for the interim between accident and trial. We disagree.

The instructions should be read together, as a whole, in determining whether a party was prejudiced by them. The trial court properly instructed the jury to compute separately damages for pain and suffering, medical expenses, and loss of income accrued, and future damages. In light of such instructions, we assume that the jury recognized the distinction

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The kit consists of a cable that extends around the head of the press which, when it comes in contact with the operator's hand or a second party's hand, will immediately return the press to an open position. The press must then be reset to continue operation.

The enclosed sketch gives you further information and a description of how this device operates, together with list prices. . . ."

between damage already incurred, and future damage, and, in connection with the latter, adjusted downward the life expectancy figure so as to give effect to the fact that there was a three-year interval between the date of accident and the date of trial. At least we are unwilling to assume the contrary. *Rasmussen Drilling, Inc.* v. *Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir. 1978).

IV. INSUFFICIENCY OF EVIDENCE

Defendant's final contention is that the evidence is legally insufficient to support the verdict. Counsel asserts that plaintiff's evidence only established that she suffered a hand injury when, for some inexplicable reason, the press head descended. In our view, the plaintiff's evidence showed much more than just that. The plaintiff offered expert testimony to establish a design defect under several different theories, including, failure to install a so-called cable kit, or perimeter wire, which would cause the press head to rise if it contacted a part of an arm or a hand.[21] Defendant's experts

[21] At trial plaintiff introduced evidence of possible defective design under the following theories:

1. The theory that the machine was defective because it was not equipped with the so-called cable kit, or perimeter wire, which would cause the head to ascend if it contacted part of an arm or hand.

2. The theory that the mysterious descent of the head, when coupled with proof of normal maintenance and lack of substantial alteration, established that some defect must have existed.

3. The theory that one of the valves which opens to permit air to fill the cylinder which in turn drives the press head downward became stuck open when a particle momentarily lodged in its port. Defendant demonstrated that the likelihood the accident occurred in this fashion is negligible, since the press head would not have ascended upon depression of the green button, as

conceded that Mrs. Rexrode would not have been injured if the press had been equipped with a safety cable kit.

Plaintiff also introduced evidence tending to prove that defendant failed to include adequate maintenance instructions and warnings with the press when it was shipped to Fort Riley in 1959 for installation. Defendant presented evidence that the Humpfrey valve, upon which the cable kit design was predicated, was not developed until the 1960's. However, the jury was instructed to consider feasibility and the "state of the art" for the industry at the time the press was manufactured. The mere fact of continuous use of a product without injury is not, by itself, conclusive evidence that the product was not defective. *Sterner AERO AB* v. *Page Airmotive, Inc.*, 499 F.2d 709 (10th Cir. 1974). In short, in considering the evidence in a light most favorable to the plaintiff, drawing all reasonable inferences and resolving all factual conflicts in accord with support for the verdict, *Gardner* v. *General Motors Corp.*, 507 F.2d 525, 527 (10th Cir.

Rexrode testified it did, until the foreign matter was removed from the valve.

4. The theory that failure to design the press to include a nonadjustable safety rod contributed to the plaintiff's injury. Rexrode presented evidence that use of an adjustable rod allowed the machine to be set so that it went into the lock position some distance above the pressing surface. Once the press locks, the press head will descend without depression of the red buttons.

Defendant introduced some proof that this particular defect, if it was indeed a design error at all, could not have been the cause in fact of the Rexrode accident.

5. The theory that the machine was defective because the defendant's predecessor delivered it to Fort Riley without adequate maintenance instructions and warnings. Plaintiff also argued that defendant violated a continuing duty to warn by failing to notify Fort Riley directly of a new safety feature, the cable kit, which it had developed.

1974), it cannot be said that plaintiff failed to advance evidence sufficient to require submission of the matter to the jury. The evidence supports the verdict.

Judgment affirmed.

In The

United States District Court

For the District of Kansas

OK NYO REXRODE,
Plaintiff,

UNITED STATES OF AMERICA,
Intervenor,

v.

AMERICAN LAUNDRY PRESS COMPANY and its successor corporation, McGRAW-EDISON COMPANY,
Defendant.

Civil Action No. 78-4207

TRANSCRIPT OF PROCEEDINGS
AFTERNOON SESSION
THURSDAY, JUNE 24, 1980

• • •

Q. [By Mr. Levy:] What about the case of Silva versus American Laundry Machinery Industries in Los Angeles, California? Have you by any chance been hired in that case?

A. [By Mr. Hanson:] Can you describe some more to me about it?

Q. It's a laundry press case which closed on a woman's hand.

A. What is the laundry, where was the—

Q. (Interrupting) In Los Angeles, California. I can be a little more specific, I think.

A. Was it manufactured by Ajax?

Q. Yes. Apparently the press head was caused suddenly and without warning to close upon the left hand of the plaintiff, thereby causing severe and permanent injuries to his person, including and not limited to a partial amputation of his left hand.

MR. PATTERSON: I object to counsel reading pleadings because they are hearsay.

THE COURT: Overruled in this case.

Q. [By Mr. Levy:] Do you know anything about that?

A. I don't recall it.

• • •

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No. 82-119

In the Supreme Court of the United States

October Term, 1982

AMERICAN LAUNDRY PRESS CO. and Its Successor Corporation, McGRAW-EDISON COMPANY,
Petitioners,

vs.

OK NYO REXRODE,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STEVEN L. HORNBAKER
(Counsel of Record)
715 North Washington Street
Junction City, Kansas 66441
Telephone: (913) 762-2100
Counsel for Respondent

On Brief for Respondent:

JERRY K. LEVY
Suite 210, 112 S. W. 6th Street
Topeka, Kansas 66603
Telephone: (913) 232-2727

CRAIG J. ALTENHOFEN
715 North Washington Street
Junction City, Kansas 66441
Telephone: (913) 762-2100

E. L. MERDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-8080

QUESTIONS PRESENTED FOR REVIEW

The respondent asserts that a Writ of Certiorari should not be issued because the United States Court of Appeals for the Tenth Circuit entered a judgment in this proceeding which was based upon a proper decision on the following issues:

1. Whether the Court of Appeals properly applied the substantive evidentiary laws of Kansas in a diversity strict liability case.
2. Whether an industry standard establishing only voluntary guidelines was properly excluded in light of a more stringent and mandatory Federal regulation concerning safety devices upon laundry presses.
3. Whether the mere mention of certain cases by respondent's counsel only during cross-examination, in order to determine if the petitioner's witnesses knew facts not known to the respondent constituted any error or departure from the accepted and usual cause of judicial proceedings.

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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The original opinion of the Court of Appeals and the modified opinion of the Court of Appeals are reproduced in the Appendix of the petitioner's Petition for Writ of Certiorari. Where reference to these opinions is necessary in this brief citation is made to the appropriate page of the Appendix to the petitioner's petition.

STATEMENT OF THE CASE

Respondent brought this action against the petitioner solely upon a theory of strict product liability. The respondent's petition alleged only strict product liability and the case went to trial solely upon strict product liability. The respondent never alleged negligence or breach of warranty by the petitioner.

It is true that respondent was supplied with the names of other lawsuits filed against the petitioner. However, these names were supplied only after strenuous efforts by the respondent and an order compelling discovery against the petitioner. Despite her reasonable requests the respondent was never allowed to see petitioner's files on these other cases.

The respondent introduced evidence of five theories of possible defective design. (Petitioner's Petition for a Writ of Certiorari at A-15, A-16, A-30 and A-31). The petitioner's expert witness admitted upon direct examination that the laundry press in question was required to have been equipped with a non-operator safeguard system as required by the OSHA regulation appearing at 29 C.F.R. 1910.212 (1981) and with which Plaintiff's Exhibit 30 is concerned. (A-3). In addition the defendant's expert witness admitted that the 1941 ANSI Standard upon which the OSHA regulation was based also required a device similar to that described in Plaintiff's Exhibit 30. (A-4). If such a device had been installed the injury to the respondent would not have occurred. (A-1, A-2 and A-3).

The jury returned a verdict stating that the petitioner was 100 per cent at fault for injury because of the defective design of the laundry press. Any one or all of the five theories of defectiveness presented is sufficient to support the verdict of defectiveness.

These are the only statements which the respondent feels are necessary to correct inaccuracies and omissions in the petitioner's Statement of the Case.

REASONS FOR DENYING PETITION

I. There Is No Conflict Among the Circuits Regarding the Applicability of the Federal Rules of Evidence in a Strict Products Liability Diversity Action.

In its decision the Tenth Circuit Court of Appeals did not fail to apply the Federal Rules of Evidence in determining the admissibility of the 1972 ANSI standard. The petitioner completely misinterprets the Court of Appeals' application of state evidentiary law. State evidentiary law was applied only as it concerns the elements of strict product liability. In fact the circuits are in absolute accord on the application of state substantive law in a diversity action.

> This is a diversity case under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), and federal courts are to apply the substantive law the state in which they are sitting would apply if the case had originated in a state court.

Stonehocker v. General Motors Corp., 587 F. 2d 151, 154 (4th Cir. 1978).

The court in *Stonehocker* specifically noted that it is sometimes difficult to separate substantive evidentiary law from the procedural rules of evidence. "This procedural as opposed to substantive distinction is not always easy to apply, and evidence law has caused particularly difficult problems." *Stonehocker v. General Motors Corp.*, 587 F. 2d at 154. In the instant case the Court of Appeals

relied upon *Fabian v. E. W. Bliss Co.*, 582 F. 2d 1257 (10th Cir. 1978), in ruling that state evidentiary law was to be applied to determine admissibility of industry standards in diversity strict liability cases. This reflects the idea that state substantive law controls the underlying cause of action. Therefore, in order to prove a cause of action in a diversity case the plaintiff must satisfy the elements of the cause of action as determined by the evidentiary requirements of state substantive law.

In *Fabian* the court followed the substantive evidentiary law of New Mexico in determining the relevance of industry standards proffered by the defendant. In the instant case the Court of Appeals properly looked to Kansas's substantive evidentiary law pertaining to the use of industry standards in design defect cases. Neither the trial court nor the Court of Appeals in the instant case considered the Kansas Procedural Rules of Evidence for any purpose in this case.

The remaining cases cited by the petitioner in pressing this "conflict among the circuits" argument simply stand for what has already been stated above. In *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F. 2d 950 (5th Cir. 1979), *modified*, 609 F. 2d 820, 821 (5th Cir. 1980) certain evidence was deemed admissible as an exception under the Federal Rules of Evidence. The Court of Appeals ruled that the trial court had improperly applied a state procedural rule of evidence pertaining to a hearsay exception.

In *Murphy v. L & J Press Corp.*, 558 F. 2d 407 (8th Cir. 1977) the court ruled certain ANSI standards admissible: "The use of these standards for this limited purpose is admissible under Rule 402 of the Federal Rules of Evidence, as it relates directly to the feasibility question, i. e. could L & J have feasibly included some form

of protective device on the press." *Murphy v. L & J Press Corp.*, 558 F. 2d at 411. In *Murphy* the court first looked to state law: "It is well settled law in Missouri that failure to provide a safety factor in a machine's design (here a point of operation guard or some other protective device) can constitute a 'defective condition,' *Keener, supra; Higgins v. Paul Hardeman, Inc.*, 457 S.W. 2d 943, 947 (Mo. App. 1970), . . ." *Murphy v. L & J Press Corp.*, 558 F. 2d at 411.

The court in *Murphy* relied upon substantive evidentiary state law in admitting the ANSI standards as evidence of defectiveness. The *Murphy* court merely used Federal Rule of Evidence 402 as the procedural means of admitting the evidence at trial.

In *Pollard v. Metropolitan Life Ins. Co.*, 598 F. 2d 1284 (Third Cir. 1979), the Court held that the Federal Rules of Evidence govern the admissibility of documentary evidence in federal diversity cases. There the rules were applied procedurally to exclude certain language from proffered evidence. The ruling in *Pollard* involved only a procedural application of the Federal Rules of Evidence. Whether the evidence offered met the substantive evidentiary requirements of that underlying state action was not at issue. The Court of Appeals' opinion in the instant case was focused upon the substantive evidentiary requirements of Kansas' strict product liability law. *Pollard* and the instant case are readily distinguishable; they do not indicate any conflict among the circuits regarding the proper use of the Federal Rules of Evidence.

In the instant case the Court of Appeals stated: "In our opinion the trial judge properly excluded the 1972 ANSI standards under Rule 403 of the Federal Rules of Evidence, as it was of limited relevance and likely to

confuse the jury". (Petitioner's Petition for a Writ of Certiorari at A-14 and A-29). From this language it is apparent that the Court of Appeals properly relied upon the Federal Rules of Evidence in deciding procedural evidentiary questions. Furthermore, the Court of Appeals properly looked to state substantive evidentiary law in assessing the comparative relevance of industry standards and Federal regulations in a strict product liability case. This utilization of substantive state evidentiary law is consistent among the circuits, see *Stonehocker v. General Motors Corp.*, 587 F. 2d at 154, and is in fact mandated by *Erie Railroad Co. v. Tompkins*, 304 U.S. at 64.

II. No Kansas Appellate Level Court Has Considered the Relevance of an Industry Standard When a Conflicting Federal Regulation Is in Effect.

In the instant case the Court of Appeals looked to state law only for the substantive evidentiary law regarding strict liability actions. According to *Erie* the court is obligated to apply the substantive law of Kansas. Petitioner argues that the Court of Appeals disregarded that obligation here. In fact there is no Kansas precedent concerning the admissibility of an industry standard when a more stringent federal regulation is in effect.

At this point it is important to have the following facts squarely in mind.

(1) At trial the respondent offered and the court admitted a 1941 ANSI standard which the laundry press in question did not satisfy.

(2) The laundry press was manufactured and sold to the United States Government in 1959, the 1941 standards were still in effect.

(3) At trial the respondent offered over the objection of petitioner and the court refused to admit a 1961 postmanufacture ANSI standard.

(4) At trial the respondent offered with no objection by petitioner and the court admitted a letter from petitioner which announced the requirements of an OSHA regulation, found at 29 C.F.R., Sec. 1910.212 (1981), which was mandatory and which the laundry press did not satisfy. (See Appendix pp. A-5 and A-6).

(5) At trial the court refused to admit a 1972 ANSI standard which was not mandatory and which was less stringent than the 1972 OSHA regulation.

The 1972 ANSI standard was prepared by the laundry press industry purely as a voluntary guideline. Whereas, the 1972 OSHA regulation absolutely required that all existing laundry presses be outfitted with a safety device which was lacking on the laundry press in question. The petitioner admitted as much in a letter dated February 11, 1972 which was sent to all of its field representatives. (Petitioner's Petition for a Writ of Certiorari at A-13 and A-28) (A-5 and A-6).

The petitioner cites *Jones v. Hittle*, 219 Kan. 627, 549 P. 2d 1383 (1976), as the controlling Kansas case. *Jones v. Hittle* dealt only with the effect of compliance with a state regulation in a negligence, strict liability, and breach of warranty action. The Court of Appeals correctly summarized *Jones v. Hittle* when it stated:

> *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P. 2d 1383, 1389-90 (1976), relied on by the defendant, holds that evidence of compliance by a defendant with a state regulation, which was stipulated to by the parties, does not conclusively prove that such defendant

> was not negligent or that the propane gas there involved was not defective.

(Petitioner's Petition for Writ of Certiorari at A-27).

In the instant case the court was faced with a federal regulation and an industry standard which were inconsistent; the Federal OSHA regulation was more stringent. In *Jones v. Hittle* the plaintiff attempted to prove a defect or negligence by presenting an industry standard in the form of expert testimony. This purported industry standard would have exceeded the requirements of the state regulation which were mandatory and were relied upon by the defendant. The holding in *Jones v. Hittle* does not provide a rule of law regarding the admissibility of an industry standard in the face of a more stringent federal regulation, which is mandatory.

The Court of Appeals has not misconstrued the rule of law stated in *Jones v. Hittle.* Rather the petitioner is attempting to have this court read language which did not appear in the *Jones v. Hittle* opinion. The petitioner states:

> (The) Kansas Supreme Court expressly held: "Compliance (*with industry or government standards*) is evidence . . . that the conforming product is not defective, and may be conclusive in the absence of a showing of special circumstances." (Emphasis added).

(Petitioner's Petition for a Writ of Certiorari at A-12). The italics portion in this quote was added by the petitioner. The choice of language is presumptious and cannot be supported by the actual case. The petitioner would have the court believe that both a regulation and an industrial standard were considered as evidence of nondefectiveness in *Jones v. Hittle.* In *Jones v. Hittle* the defendants argued that the propane involved had been

odorized as required by a state regulation. This went against the plaintiff's allegation of defectiveness. The plaintiffs attempted to rebut the adequacy of the state regulation with expert opinion testimony concerning a higher odorization requirement. Note that the tables were exactly reversed from the instant case.

In *Jones* the state regulation was mandatory and it supported a finding of nondefectiveness. The plaintiff attempted to establish a higher standard with expert testimony. This higher standard, if established, would have been purely voluntary and would not have been mandatory, as was the state regulation.

In *Jones* only a state regulation was considered as evidence of nondefectiveness and the court disregarded the testimony concerning a higher industry standard: "Under the circumstances the personal opinion of Mr. Mandell, qualified though he might be in the general field, cannot be considered 'substantial' evidence of a deficiency in the standard." *Jones v. Hittle Service, Inc.*, 219 Kan. at 633, 549 P. 2d at 1391. Therefore, the holding in *Jones* dealt only with the use of a state regulation as evidence of nondefectiveness. This is precisely how the Court of Appeals in the instant case interpreted *Jones v. Hittle.*

In the instant case the OSHA regulation mandated a higher requirement in laundry press design than that proposed in the voluntary industry standard. The Court of Appeals correctly looked to the substantive evidentiary law of Kansas and properly found that the rule in *Jones v. Hittle Service, Inc.*, 219 Kan. at 627, 549 P. 2d at 1383, concerned only the use of a state regulation as evidence of nondefectiveness. The Court of Appeals then found that the instant case concerned a federal regulation which was evidence of product defectiveness and an industry

standard which was evidence of nondefectiveness, a situation not faced by the Kansas Supreme Court in *Jones v. Hittle Service, Inc.* The Court of Appeals then correctly stated: "As no Kansas court to date has addressed this issue, this court must determine what result would be reached if the question were litigated in the state court." (Petitioner's Petition for Writ of Certiorari at A-11 and A-27).

In light of the mandatory and more stringent nature of the OSHA regulation it is entirely reasonable that the Kansas Supreme Court would not have allowed the admission of a less stringent and voluntary standard prepared by an industry association of which the defendant was a member.

III. The Appellate Court's Affirmation of the Trial Court's Decision by a Jury Was Entirely Fair and Just.

The trial below was heard before a jury. It is true that the respondent's counsel did cross-examine expert witnesses appearing for the petitioner about other claims which had been filed against the petitioner. In spite of a reasonable discovery effort to obtain the names of other cases filed against the petitioner involving similar mishaps none were produced by the petitioner until after an order by the trial court compelling discovery. Upon cross-examination at least one claim was found in a defense expert witness's file which had not been disclosed during the discovery period. (A-4). In fact, at trial, counsel for the petitioner requested that respondent's counsel further question the defense witness concerning the state of the location of certain cases mentioned during cross-examination. (A-3). Petitioner's counsel attempted no redirect examination concerning the facts of the case

names brought out upon cross-examination. The questioning involving the use of other case names took a very small amount of time. The entire trial consumed nearly one week. Other case names were used only upon cross-examination and as it turned out were not relied upon as direct evidence of the defectiveness of the laundry press. Counsel for the respondent did not refer to the other claims during opening statement, direct examination, or closing argument.

The respondent presented expert opinion of a defective safety rod as well as the failure to comply with the OSHA regulation to hold the petitioner strictly liable. Thus, the petitioner's argument that the jury verdict was premised solely upon respondent's counsel's mention of the other case names is totally fallacious.

The Court of Appeals heard full and complete arguments concerning the mere mention of other case names during cross-examination. The Court of Appeals found "that this particular line of cross-examination played a minor role in the course of trial." (Petitioner's Petition for a Writ of Certiorari at A-10 and A-25). The Court of Appeals prepared a detailed and complete opinion in the instant case and there is no basis for a finding that it has departed from the accepted and usual course of judicial proceedings.

CONCLUSION

The decision of the Tenth Circuit Court of Appeals to use substantive state evidentiary law in a diversity case is not in conflict with any other court of appeals on the same matter. Nor has the Tenth Circuit Court of Appeals decided a question involving the substantive evidentiary law of Kansas in a way in conflict with any applicable law of Kansas or decision of the United States Supreme Court. The Tenth Circuit Court of Appeals has adhered to fundamental elements of fairness and justice.

For these reasons it would be inappropriate for a Writ of Certiorari to be issued to review the judgment and opinion of the Tenth Circuit Court of Appeals in this case.

Respectfully submitted,

STEVEN L. HORNBAKER
Counsel for Respondent

On the Brief:

JERRY K. LEVY
Suite 210, 112 S. W. 6th Street
Topeka, Kansas 66603
Telephone: (913) 232-2727

CRAIG J. ALTENHOFEN
715 North Washington Street
Junction City, Kansas 66441
Telephone: (913) 762-2100

APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 78-4207

OK NYO REXRODE,
Plaintiff,

UNITED STATES OF AMERICA,
Intervenor,

v.

AMERICAN LAUNDRY PRESS COMPANY and its successor corporation McGRAW-EDISON COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

• • •

[p. 268] Q. [By Mr. Levy:] You have your copy. I am going to read this to the jury.

A. [By Mr. Roberts:] Okay.

Q. And it says, "Ajax has developed a kit for the various laundry presses that we manufacture, and to the best of our knowledge complies with the Act." Correct?

A. Yes, sir.

Q. And it goes on to say, "The kit consists of a cable that extends around the head of the press which, when it comes in contact with the operator's hand or second party's hand, will immediately return the press to an

open position. The press must then be reset to continue the operation." Is that what it says here?

A. Yes, sir, it is.

Q. Now, I want to talk about that standard that Mr. Patterson spent so much time about. Would the use of that device then comply with the standards?

A. Yes, sir.

Q. Now, the other thing in the standard, it says, "Keep the operator's hand from being caught or someone else's hand."

A. Right.

Q. Let's assume that Mrs. Rexrode had her hand in there and [p. 269] she was smoothing out the shirt. Mr. Patterson asked you to speculate on how the press could come down. One of the ways you said was somebody could come up behind her and push both red buttons. Correct?

A. Right.

Q. In such a situation as that, Mrs. Rexrode practically becomes someone other than the operator, doesn't she?

A. Yes.

Q. Or if—so really it doesn't make much difference whether it says operator or somebody else's hand, does it?

A. Well, the standard doesn't exclude either condition.

Q. Now, if Mrs. Rexrode has one hand in the press and the other hand holding onto the shirt as she testified and the two red buttons got depressed some way, she was just like another person other than the operator, wasn't she?

A. Yes, sir.

Q. And the press came down and caught her hand?

A. Sure did.

Q. Sure did. But had that little device been on there, boom, no catch, right?

A. That's correct.

Q. Now the other way, it is hypothesized that this could happen, is that the two red buttons were pressed long enough to get the head into the lock mode, she took one [p. 270] hand off and stuck her hand in, and it was caught. Again, with the devices in Plaintiff's Exhibit 30, that wouldn't have happened?

A. That's correct.

• • •

[p. 602] Q. [By Mr. Levy:] Did you find any defect in the machine which would have caused the press head to come down without the two red buttons being pushed?

A. [By Mr. Barnett:] As I recall on that machine I didn't find any defect that would cause it to come down without the two red buttons being pushed.

Q. What about Ella Monteal Miles versus American Laundry. Did you work on that case?

A. Gee.

[By] Mr. Patterson: This is a suggestion. You might indicate where these cases were.

• • •

[p. 748] Q. [By Mr. Patterson:] My question was, whether or not OSHA ever did require such a device as the one described in Plaintiff's Exhibit 30. [A-5 and A-6].

A. The answer is, I think the shortest answer is "Yes". The other people part that I told you about, the OSHA regulation also talks about other people besides the operator. This is a device that protects other people besides the operator. This is a device that protects other people.

• • •

[p. 752] Q. [By Mr. Patterson:] In your opinion did the 1941 standard require such a device?

A. [By Mr. Barnett:] I think that the 1941 standard did require such a device so that it could take care of other persons.

• • •

[p. 789] Q. [By Mr. Levy:] Now, are you also presently looking at a new case which I never even heard about until I saw your file over there, called Morgel, M-o-r-g-e-l versus American Laundry?

A. [By Mr. Barnett:] I don't even remember it by the name.

PLAINTIFF'S EXHIBIT 30

(ATTENTION)

(AJAX)

(DEALERS & DISTRIBUTORS)

February 11, 1972

The Williams-Steiger Occupational Safety & Health Act requires that certain safety devices be incorporated on all laundry presses.

The law requires that all presses shipped from our factory after February 15, 1972, be equipped with these devices. It requires that all presses in use in the field be so equipped.

The penalties are heavy for violation! It is very important that all dealers and distributors have a good understanding of the requirements; and, in all their proposals to customer, take into consideration the added cost necessary to comply with the law.

Each dealer or distributor should appraise his inventory of equipment on hand in his warehouse which was shipped from AJAX prior to February 15, 1972, and determine for himself if it is necessary to so equip these presses before they are delivered.

AJAX has developed a kit for the various laundry presses that we manufacture and to the best of our knowledge complies with the Act. We also have available a kit that can be adapted to competitive presses.

The kit consists of a cable that extends around the head of the press which, when it comes in contact with the operator's hand or a second party's hand, will imme-

diately return the press to an open position. The press must then be reset to continue operation.

The enclosed sketch gives you further information and a description of how this device operates, together with list prices.

The law further requires that all steam lines below 7 feet from the floor be insulated. AJAX has determined that this requires all exposed steam hoses to be covered with insulation. All presses shipped from the factory after February 15, 1972, will comply.

At the present time, dry cleaning presses are not covered by the Act; however, we feel it is only a matter of time before they will be included. You may want to have your dry cleaning presses so equipped when you order them from the factory so your customers will not be faced with a field conversion in a very short time.